ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTERS OF	)	
	)	
NORCOM COMMUNICATIONS CORPORATION	)	
ASS'N FOR EAST END LAND MOBILE COVERAGE	)	
LMR 900 ASSOCIATION OF SUFFOLK	)	WTB DOCKET NO. 98-181
METRO NY LMR ASSOCIATION	)	
NY LMR ASSOCIATION	)	
WIRELESS COMM. ASSOCIATION OF SUFFOLK COUNTY	)	

TO: HON. ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

MOTION FOR PERMISSION TO APPEAL

Norcom Communications Corp. ("Norcom"), by its attorneys and pursuant to section 1.301(b) of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 1.301(b) (1997), hereby moves the Presiding Judge to permit Norcom to appeal the Judge's *Memorandum Opinion and Order*, FCC 99M-1, dated January 4, 1999 ("*Order*"), to the Commission. The *Order* denied the Motions to Delete ("Motions") submitted by Norcom and the above-captioned Associations ("Associations"). As set forth more fully below, grant of this Motion is in the public interest.

Introduction.

The Motions asked that the Judge delete the issues of: (i) unlawful transfer of control; and (ii) Norcom's "abuse of process." The *Order* denied the Motions, reasoning that, among other things, whether there has been an unauthorized transfer of control depends upon the facts that will be established in this proceeding, regardless of the legal standard used to evaluate those facts. Norcom does not disagree that the resolution of this case will depend on the facts

established. However, Norcom also submits that the Judge must employ the correct legal criteria in evaluating those facts to produce a fair and efficient resolution of this proceeding. The efficient administration of this proceeding requires, therefore, that this matter be settled prior to any further proceedings.

The use of an incorrect (and possibly more stringent) control test would undoubtedly constitute severe prejudicial error. As the D.C. Circuit has ruled, the FCC must apply control criteria in a straightforward manner in hearing proceedings.[1/] It now appears that the Judge expects to employ the standard established in *Intermountain Microwave*[2/] to evaluate whether there has been an unauthorized transfer of control. The erroneous use of the *Intermountain Microwave* test in this case is especially prejudicial because Congress took great care in 1993 to specify the differing regulatory schemes for private mobile radio service ("PMRS") providers and commercial mobile radio service ("CMRS") providers. CMRS providers are, by statutory definition, common carriers, subject to Title II of the Communications Act. As noted below, the *Intermountain Microwave* criteria are designed only to apply to CMRS licensees. PMRS licensees, even if they are for-profit systems, are subject to different standards. Therefore, even if, as the Wireless Telecommunications Bureau alleges, the Associations' stations were operated on a for-profit basis, they still are regulated as PMRS facilities under the Act, and cannot be subject to the *Intermountain Microwave* criteria.

1/ See *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 655 (D.C. Cir. 1994) ("The Commission's piecemeal picking and choosing of 'relevant' control criteria, and its uneven application of those criteria, is not 'reasoned decision making, but the very sort of arbitrariness and capriciousness we are empowered to correct.'").

2/ 24 Rad. Reg. 983 (1963).

The *Order* departs from this scheme and requires Norcom and the Associations to be evaluated by standards that were never intended to apply to PMRS radio systems.

Discussion.

The correct legal standard to apply to PMRS licensees that have allegedly engaged in an unauthorized transfer of control is a "new or novel" question of law warranting full Commission review. The Wireless Telecommunications Bureau apparently agrees with Norcom, recently stating in its Consolidated Opposition to Motions to Delete that the FCC, in its rule making proceedings, "did not reach the question of whether the *Intermountain Microwave* standard applies to stations still classified as PMRS . . . ." Consolidated Opposition at 4. Further, neither the Bureau nor the Presiding Judge has cited precedent which states that the *Intermountain Microwave* test applies to PMRS licensees. The Bureau raised such a "finding" by sheer implication, id., but that finding is likely the product of oversight and/or error, as Norcom has pointed out.

The following statements of law are beyond dispute:

- By *Public Notice* No. 1932, released March 3, 1988, the FCC specified a control standard (the "*Motorola* test") for Specialized Mobile Radio ("SMR") private radio systems, interpreting the control provisions of FCC rule section 90.403.

- On September 23, 1994, pursuant to the Commission's rule making proceeding designed to implement the Omnibus Budget Reconciliation Act of 1993, the Commission re-classified certain former private radio systems as CMRS, if they offer (i) interconnected service, (ii) to the general public, (iii) on a for-profit basis.

- Because they did not offer interconnected radio service, the Associations and Norcom were *not* (and can never be) reclassified as CMRS. Both entities remain classified as PMRS as of this date, regardless of whether they offer for-profit service.

- By *Public Notice* No. DA 96-1245, released August 10, 1996, the FCC stated that those PMRS providers re-classified as CMRS providers would now be subject to the *Intermountain Microwave* control test.

Thus, the only remaining question is the "control" test to which PMRS providers who were not reclassified as CMRS providers are subject.[3/] It is this issue that requires review by the full Commission.

Indeed, although Norcom previously cited the *Motorola* decision[4/] as evidence that the *Intermountain Microwave* test does not apply to PMRS licensees, it is not even clear that the *Motorola* test is the only standard for judging control of PMRS stations. For example, the FCC employed yet another test when it specifically considered the issue of control in cases involving cooperatively licensed private radio systems. In *John S. Landes, M.D.*,[5/] the full Commission examined a complaint that a carrier had, by its management of a private cooperatively-licensed system, unlawfully assumed control. The Commission flatly rejected that argument, stating that:

> The regulatory objectives in assuring licensee control in the private services, however, are quite different from our control objectives in the broadcast and common carrier services. Engrafting legal doctrines from the broadcast and common carrier fields into the private services does not in our estimation promote the public interest . . . .

3/ It would have been illogical for the Commission to state that the *Intermountain Microwave* test applied to reclassified PMRS licensees, but as the Bureau suggests, really intend for that test to apply to all PMRS licensees, whether reclassified as CMRS or not.

4/ *Applications of Motorola, Inc.*, File No. 507505, Order, (July 30, 1985). The "control" test set forth in the *Motorola* decision was summarized and restated in FCC *Public Notice* No. 1932, released March 3, 1988.

5/ 86 FCC 2d 121 (1981).

Id. at ¶ 26. The Commission applied a control test for private cooperative systems which mirrors FCC rule section 90.403, and ensures that licensees are responsible for seeing that (i) the facilities are used only for permissible purposes; (ii) only in a permissible manner; and (iii) and only by persons with authority to use and operate the transmitter. Id. at ¶ 27. The Commission added that "there are no limitations in the rules as to the arrangements licensees may make to secure radio equipment and service." Id. at ¶ 24.

The *Order* also appears to rely on the erroneous assumption that a station that offers "for-profit" radio service is a commercial mobile radio service ("CMRS") station. As noted above, this assumption is inaccurate. As Norcom pointed out in its Reply to the Bureau, a station must be interconnected to the public switched telephone network ("PSTN") before it can be said to offer CMRS. Thus, Norcom also seeks permission to appeal the Judge's related finding that the *Intermountain Microwave* test may apply to for-profit PMRS stations.

Finally, Norcom seeks the Presiding Judge's permission to appeal the portion of the *Order* that denies Norcom's request to delete the issue of "abuse of process." In its Motion to Delete, Norcom produced key documents, the authenticity of which was not challenged by the Bureau, which indicated that the Associations voluntarily disclosed Norcom's role as manager. The *Order* holds that the Bureau "intends to offer evidence" that Norcom did not make a "full disclosure" to the Bureau in 1991-92. The Presiding Judge should permit Norcom to appeal that interlocutory ruling because failure to make a "full disclosure,"[6/] even if proven true, does not mean that Norcom is a "serious threat" to the FCC's licensing

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6/ Failure to make a full disclosure is not a rule violation. However, it appears analogous to a violation of FCC rule 1.17, which prohibits "willful material omissions" in FCC proceedings. However, the Bureau has not indicated what information Norcom failed to impart.

process. Further, the Bureau cannot prove, as a matter of law, that a simple failure to make a full disclosure constitutes "a specific finding, supported by the record, of abusive intent." *Trinity Broadcasting of Florida, Inc.*, 10 FCC Rcd 12020, ¶ 324 (1995).

Notwithstanding the foregoing, the Bureau has not established a single fact, or even alleged, that Norcom has in any way concealed its activities, or misrepresented facts to the Commission. Similarly, the Bureau has not pointed to a single FCC inquiry or FCC form which required more disclosure than that provided by the Associations or Norcom. In fact, as the documents appended to Norcom's Motion to Delete prove, the Associations voluntarily revealed that Norcom would serve as each stations' manager. The documents also prove that the FCC granted the Associations' applications with knowledge of these facts. The Bureau fails to specify what facts have changed which now call for a conclusion that Norcom, a company that has provided two-way radio services for 25 years to a variety of commercial and public safety entities, is suddenly a "serious threat" to the agency.

Accordingly, it is a novel question of law whether the agency can accuse an applicant's manager (not even the applicant) of "abuse of process" while (i) overlooking key documents demonstrating that the agency knew of the management relationship at the time it granted the applications; and (ii) not making a single allegation of intentional concealment or misrepresentation. The *Order* relies instead on the Bureau's promise to introduce adverse evidence at the hearing. Norcom believes that this promise, standing alone, is insufficient to overcome Norcom's document-based rebuttal of the "abuse of process" issue. Because the burden in this proceeding is on the FCC -- not Norcom – the Presiding Judge should permit Norcom to seek the full Commission's review of this issue.

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Based on the foregoing, Norcom respectfully requests that the Presiding Judge permit Norcom to file an interlocutory appeal.

Respectfully submitted,

NORCOM COMMUNICATIONS CORPORATION

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Dated: January 7, 1999

CERTIFICATE OF SERVICE

I, Russ Taylor, certify that I have this 7th day of January, 1999, caused to be sent by hand delivery, a copy of the foregoing Motion to the following:

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